United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1475

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

MAX KAVALER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR MAX KAVALER

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PRELIMINARY STATEMENT

Stripped of its inflated rhetoric and its not so subtle invitation to this Court to dismiss appellant's arguments as captious criticism and mere technicalities because appellant has not challenged the sufficiency of the evidence against him (and is therefore somehow admittedly guilty), the Government's response to our claims of error in this case is both disappointing and unconvincing.

Analysis of the issues presented on this appeal does not gain any illumination by the prosecutor's repeated assertion that Max Kavaler's conviction is "well-warranted" [Gov't. Br. at 14], "well-deserved" [Gov't. Br. at 24] and "just" [Gov't. Br. at 38], particularly since we have not chosen in our principal brief to remind this Court that appellant continues to maintain his innocence, notwithstanding the verdict below. Dispassionate and objective examination of the legal issues raised by the record before this Court ought not to be prejudiced by a prosecutorial plea for affirmance whose validity rests entirely on the submission that the jury had before it overwhelming evidence establishing the guilt of the accused. As the late Judge Jerome Frank cogently demonstrated more than thirty years ago, "It is seldom possible with even moderate competence

to conjecture solely from perusal of a written or printed record whether or not a defendant is guilty". United States v. Rubenstein, 151 F.2d 915, 920 (2nd Cir.) (Frank, J., dissenting), cert. denied, 326 U.S. 766 (1945).

Instead of engaging in unseemly denigration of defendant's arguments on this appeal as "Rube Goldberg" "attempts" [Gov't. Br. at 23], counsel for the Government would do well to recall that the interest of the United States Attorney "in a criminal prosecution is not that it shall win a case, but that justice shall be done". Berger v. United States, 295 U.S. 78, 88 (1935). Conscious of this basic principle, we now turn to a detailed examination of and reply to the arguments presented in the Government's answering brief.

POINT I

AS TO THE MISLEADING OF THE GRAND JURY

The Government, in attempting to minimize the prejudicial impact of the misleading questioning of H.E.W. Investigators Charles Kenher and Rena Morey before the grand jury, argues that (1) the use of the word "testify" on January 29, 1976 did not connote statements under oath, and (2) the use of the words "interviewed by you or other people in the United States Attorney's office" on March 11, 1976 was not meant to indicate the location of each interview.*

*The Government's claim that no argument was made below that Miss Morey's March 11, 1976 testimony in any way misled the grand jury is refuted by the record [App. 68]. See infra pp. 7-9.

The use of the word "testify" in conducting the questioning concerning the "interviews" of Carmen Irizarry and Marie Colon, we submit, was misleading and prejudicial. The Government, in its attempt to diminish the significance of its error, characterizes the use of the word as "inartful" [Gov't. Br. at 15] and "ambiguous" [Gov't. Br. 19, 23, 24, 25 and 26].* Whether or not that characterization is accurate, the proferred explanation of why the grand jurors might not have relied upon the words actually used is plainly deficient.

The Government's explanation runs as follows: (1) the "ambiguity" related to only two of four patients; (2) the use of the term "testify" was always tied to interviews by the H.E.W. investigator and his staff; and (3) there was a six-week period between the use of the word "testify" and the filing of the superseding indictment. Accordingly, it is argued, that the grand jury could not have been misled.

First, since the original indictment (76 Cr. 110) contained substantive counts relating to only four patients, the investigator's statement that two had "testified" must have been a weighty consideration in favor of indictment.

*In contrast, the Government below argued that it did not agree with what it referred to as the District Court's "strict interpretation of the word", [App. 71], i.e., that "testify" means to give a statement under oath.

Moreover, the use of the word "testify" may have persuaded some or all of the grand jurors not to call the patients themselves as witnesses if they were so inclined.*

Second, the Government's explanation that "there was no suggestion in the prosecutor's questioning that Kenher was testifying to anything but his own or staff member interviews of the patients", [Gov't. Br. at 19] is controverted by the plain meaning of the words contained in the colloquy under consideration.

The unmistakable meaning of the questions propounded by the prosecutor and the answers elicited from the H.E.W. investigator is that the two patient-witnesses, Irizarry and Colon, had given sworn statements at some formal proceeding. The Government's assertion that the word "testified" was intended to be understood and was understood by the grand jurors as "interviewed" is baseless. Although, as the Government contends, there was no clear

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*The Government places great stress on the fact that:

> "After Kenher had testified, the Assistant carefully advised the grand jurors that Kenner's testimony had been based on hearsay and that, if they wished, the patient-witnesses could be called upon to testify in person." [Gov't. Br. at 19]

However, the record reveals that this warning was not given directly after Kenher's testimony, but followed the testimony of David Kaiser, an auditor with the New York State Department of Social Services. The record does not reveal the amount of time that elapsed between the testimony of Kenher and the testimony of Kaiser. [App. 479-482]

suggestion that Kenher had placed Irizarry or Colon under oath and questioned them before a grand jury [Gov't. Br. at 25], the grand jurors might well have believed that these two patients had given "testimony" during administrative proceedings conducted by the New York City Department of Social Services, the New York State Department of Social Services or the United States Department of Health, Education and Welfare.*

Furthermore, even accepting the Government's argument (i.e., that "testified" was understood to mean "interviewed"), the grand jurors were misled. If the grand jurors were told, or if it was intended that they should understand, that the patients had been "interviewed", then the nature of the shoddy merchandise which they were given was still misrepresented. These patients had not been "interviewed". At best, the record reveals that some or all of the patients had been merely telephoned by investigators assigned to the case. The District Court accepted, for purposes of the motion, that the patients had not been personally interviewed. [App. 63] The Government did not dispute this [App. 51, 63, 68]. An "interview", as that term is ordinarily understood, is a face-to-face meeting.

*These agencies were referred to by Kenher during his January 22, 1976 grand jury appearance [App. 445-448] and his January 29, 1976 appearance [App. 467-478].

The dictionary defines interview as:

> "1. A mutual sight or view; a meeting face to face; usually, a formal meeting for consultation; a conference; as an interview with the President."
> Webster's New International Dictionary, (2nd ed.)(portion omitted) (emphasis added).

The effect of Charles Kenher's grand jury testimony is unmistakable. He told the grand jurors that Irizarry and Colon had "testified". They had not. The Government on appeal now claims that these patients had been "interviewed". They had not. The impression conveyed by Mr. Kenher's testimony was that Irizarry and Colon had given sworn statements. Even under the Government's own interpretation, the grand jury was left with the impression that a trained Government agent, presumably responsible, had actually met and conferred with the patients. The grand jurors can hardly be faulted for relying on the Government agents' face-to-face meetings with the patients and the agents' judgment as to whether the persons interviewed had lied or - because of unconscious bias or faulty memory - had provided inadvertently inaccurate information.

Clearly, had the grand jury been told that the patients were merely telephoned by Kenher and other agents and, as the prosecutor admitted, that the only record of these telephone chats were notes which were "neither the verbatim or substantially verbatim statements of any witness, nor were any of the notes reviewed, adopted or

approved by any witness", [App. 519], they might have voted not to indict, or, at a minimum, they might well have insisted on hearing testimony from the patients themselves before reaching a decision.

Third, the fact that there was a six-week period between Kenher's testimony and the filing of Indictment 76 Cr. 241 does not diminish the reliance placed upon Kenher's misleading testimony. The grand jury, having already been informed that patients had "testified" to the acts referred to in the indictment, might easily concluded that they were merely voting for a superseding indictment which did nothing more than technically expand the number of patients and counts involved. Alternatively, the grand jurors might have forgotten the exact words of Kenher's testimony and only remembered that they had indicted Kavaler for Medicaid fraud on January 29, 1976. Having already indicted Kavaler, the grand jury might well have been persuaded in principal part by their prior decision (which resulted from Kenher's assurances) to reindict him. If the latter occurred and the grand jury voted Indictment 76 Cr. 241 on the basis of having already voted Indictment 76 Cr. 110, then the prejudice was not attenuated.

In regard to Ms. Morey's testimony, the Government ignores appellant's argument that the grand jury was misled by the Assistant's use of the word "interview".

The Government asserts that the patients were, in fact, "interviewed" [Gov't. Br. at 22, 24] and that the colloquy

> Q. Those are patients that have been interviewed by you or other people in the United States Attorney's Office?
>
> A. Right.

refers not to a location, but to the identity of the persons who conducted the interviews.

Appellant's submission both in the District Court [App. 68] and on appeal, as previously stated, is that these patients had not been "interviewed" and that the grand jury was misled when it was told they had been.

The effect of Ms. Morey's testimony is clear. The grand jury was told that twenty-five patients had been "interviewed" by Government agents. The impression left on the grand jurors was that these patients had been questioned in person. During such a face-to-face encounter the agent could reasonably be relied upon by the grand jurors to reject unreliable information provided by the patients. Had the grand jury been told on March 11, 1976 that there merely had been faceless telephone contacts with the patients, they might have similarly voted not to indict. At the very least, they might have asked that the patients be subpoenaed.

The Government confidently asserts that if the patient-witnesses had "actually appeared in the grand jury, there is not the slightest reason to believe that appellant would not have been indicted" [Gov't. Br. at 26]. This unsupported conclusion, we submit, is not free from doubt

in view of the fact that the trial jury rejected the testimony of two of the patients when it acquitted appellant on Counts 19 and 25. Moreover, since ten of the twenty-five patients named in the superseding indictment never testified at trial, the Government's prognostication of what the grand jury would have done had it heard them is simply unadulterated speculation.

Finally, the Government's argument that even if the substantive counts fail, the evidence concerning the patients would have been admissible as similar act proof demonstrating knowledge, intent, a common scheme and the existence of a conspiracy fails to consider that the admission of such evidence rests within the trial court's sound discretion. See Fed. R. Evid. 404(b). Had the substantive counts been dismissed, as they should have been, it would have been well within the trial court's discretion to reject the evidence concerning the patients as similar act proof.

The Government's conclusion that, even if the substantive counts had been dismissed, the evidence concerning the patients would have been admissible as similar act evidence on the conspiracy count is unwarranted. The evidence concerning the patients was admitted as direct proof of the substantive counts and the issue of whether it was admissible in connection with the conspiracy count was never considered by the trial court. As this Court

stated in United States v. Kaplan, 510 F.2d 606, 613 (1974) (on petition for rehearing):

> "Here, of course, the purpose of admissibility on appeal is not the same as, but is signally different from, the limited purpose which was all the trial judge saw fit to allow. Arguments defense counsel could have made to cope with [the introduction of similar act evidence] were never made because they were not apposite."

The admissibility of the evidence concerning the patients as similar act proof in regard to the conspiracy count depended upon findings that were for the trial judge to make in the first instance. United States v. Papadakis, 510 F.2d 287, 294 (2nd Cir.), cert. denied, 421 U.S. 950 (1975).

As stated in United States v. Kaplan, supra, 510 F.2d at 612:

> "The decisive point now is that the findings were not made. It is not enough to suppose that the judge 'would have' or 'might have' made them. The fact is that he did not. And it was for him, not for an appellate court, to confront and assess the evidence at the point of decision."

Accordingly, we submit that if the substantive counts fail, the verdict on the conspiracy count was irreparably tainted and that a new trial must be ordered.

POINT II

AS TO THE PROSECUTOR'S FAILURE TO CORRECT FALSE TESTIMONY

It is undisputed by the Government that when the prosecution knowingly permits perjury or fails to

correct false testimony, a conviction must be reversed if "the false testimony could...in any reasonabl likelihood have affected the judgment of the jury", e.g. Giglio v. United States, 405 U.S. 150, 154 (1972). The Government contends, however, that the factual premise required for the application of this rule does not exist in this case, since it is claimed that Gloria Silva did not testify falsely or inaccurately and that, in any event, there was no "reasonable likelihood" that her testimony "affected the judgment of the jury". [Gov't. Br. at 37]

The Government's argument continues that since Silva did not testify falsely, the criteria for the granting of a new trial on the ground of newly discovered evidence are (1) the defendant must satisfy the court that the new evidence is such that it could not with due diligence have been discovered before, or, at latest, at trial, (2) the evidence must be material to the factual issues at the trial and not merely cumulative, and (3) it must be of such a nature that it would probably produce a different result in the event of a retrial. [Gov't. Br. at 35-36] It is further contended that none of these criteria were present in this case and that the court applied the correct standard in denying the motion.

We submit that this is not the proper rule to be applied where, as here, the newly discovered evidence was known to the prosecution before the verdict was returned,

but was not disclosed to the Court or defense counsel. This Court stated in United States v. Kahn, 472 F.2d 272, 287, cert. denied, 411 U.S. 982 (1973):

> "The general standard governing motions for a new trial on the grounds of newly discovered evidence is familiar. The evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict in the event of a retrial. United States v. DeSapio, 456 F. 2d 644, 647 (2nd Cir. 1972); United States v. Polisi, 416 F.2d 573, 576-577 (2nd Cir. 1969). The function of a court of appeals in reviewing a denial of an ordinary new trial motion is a limited one; the motion is directed to the trial court's discretion and factual determinations may not be set aside on review unless 'wholly unsupported by evidence.' United States v. Johnson, 327 U.S. 106, 111-112, 66 S.Ct. 464, 90 L.Ed. 562 (1946); United States v. Silverman, 430 F.2d 106, 119-120 (2nd Cir. 1970), cert. denied, 402 U.S. 953, 91 S. Ct. 1619, 29 L. Ed. 2d 123 (1971).
>
> However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. Giglio v. United States, 405 U.S. 150, 153-154, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)."(emphasis added).

Underlying the Government's argument is the assertion that Ms. Silva did not testify that she saw

Dr. Kavaler working at the Lee Avenue Clinic in 1972 and 1973. The Government insists, contrary to the plain meaning of the witness' words, that the import of Ms. Silva's testimony was that she had seen Kavaler at the clinic in 1972 and 1973, but was uncertain whether she had been working there during that period [Gov't. Br. at 30].

This position is belied not only by a simple reading of Ms. Silva's testimony at trial, but by the prosecutor's admission during the post-trial hearing that his questioning of Ms. Silva on direct examination was designed "to establish that he [Dr. Kavaler] was working there". [App. 384] Furthermore, the Government's attempt to bifurcate her direct testimony into two distinctly separate statements [i.e., (1) that she saw him but (2) she was not sure whether he was working] is unsupported by the record.

> The Government's argument that the colloquy
>
> "(By Mr. Wilson):
>
> Q. When do you recall was the last year you saw him?
>
> THE COURT: The last time you saw him treating patients is what the question was.
>
> A. I'm not too sure, '73, '72.
>
> Q. '72 or '73?
>
> A. Yes.
>
> Q. The last payment you saw was January of '74, do you remember him treating patients then?
>
> A. Could be." [App. 149; emphasis added]

means that Ms. Silva was uncertain whether he had been working there during 1972 and 1973 is artificial. First, the witness' unequivocal answer "Yes" establishes that she saw him working at the clinic during that period. Second, even viewed most favorably to the Government, the witness' answer indicates that she definitely saw him working there during either 1972 or 1973. Third, the prosecutor himself understood Ms. Silva's testimony to mean that she saw Kavaler working at the clinic during that period. In his summation, the prosecutor asked the jury to find that appellant had been working at the clinic until December 1973 based upon Ms. Silva's testimony:

> "You heard the testimony of Dr. Alizadeh and his secretary, Mrs. Silva, they were receiving rent payments from him as late as January, 1974, and it was their best recollection that he worked there as late as December, 1973...." [App. 198]

The Government did not argue to the jury, as it does to this Court, that Silva had seen Kavaler at the clinic in 1972 and 1973, but was uncertain whether he had been working there during that period. The Government argued below that it was Silva's "best recollection that he [Dr. Kavaler] worked there as late as December, 1973...."

The Government does not dispute that Silva appeared in the courthouse the morning after she testified to change her testimony and to see the trial judge.* Nor

*Appellant assumes, for the purposes of this appeal, that the prosecutor met with Silva and learned of the false testimony during the recess just prior to defendant's summation, as Government counsel testified at the post-trial hearing.

does the Government dispute the fact that Silva then unequivocally denied having seen Kavaler working at the clinic in 1972 or 1973.

Having learned these new facts, the prosecutor was required to alert the Court and defense counsel.* Had the prosecutor done so, the jury could have heard her testimony that she did not see Kavaler working at the clinic in 1972 or 1973.**

The Government, while conceding its error in not informing the Court and defense counsel of Silva's return to the courthouse and her disclosure to the prosecutor, completely ignores appellant's contention that this witness was misled by the prosecutor when he showed her only the transcript of her cross-examination. [Appellant's Br. 29]. The Government admits that Silva was only shown a transcript of her cross-examination by defense counsel. [Gov't. Br. 33]. By only showing her the cross-examination, the trial judge's interjection of "The last time you saw him treating patients is what the question was" and her answer were concealed and resulted in her leaving the courthouse under the misapprehension that nothing in her

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*The Government admits that this would have been the better course. [Gov't. Br. at 38]

**Had the prosecutor informed defense counsel of the newly discovered evidence in his possession, as he was required to do, defense counsel would not have been forced to explain in his summation the effect of this inaccurate testimony. [App. 201-202]

testimony required correction.* For this, the Government inexplicably offers no explanation, justification or concession of error.

Finally, the Government's claim that Ms. Silva's false testimony did not, with any reasonable likelihood, affect the judgment of the jury is without merit. As the prosecutor argued to the jury, the diary was "[t]he very key to Dr. Kavaler's defense". [App. 197]. If the diary was accepted by the jury as an accurate account of patient treatments, then not a single invoice concerning patients treated at the Lee Avenue Clinic was fraudulent and Dr. Kavaler should have been acquitted. If Ms. Silva's erroneous testimony was believed by the jury, then the jury easily could have concluded that Dr. Kavaler's sworn testimony as to why the diary ended on May 27, 1971, i.e., the date he stopped working at the clinic, was perjurious and that the diary should be rejected as a recent fabrication.

In addition, if the Government could prove that the Lee Avenue diary, Defendant's Exhibit AC, was a recent fabrication, then the jury could also easily have rejected the Galler Medical Center diary, Defendant's Exhibit AD. This is precisely what the Government argued in support of conviction. [Tr. 1340-1344].

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*In this regard, it should be noted that Silva's cross-examination begins at the top of a page of the record. [App. 151]. Since transcripts are printed on only one side of a page, the witness might not have known that her direct examination was contained on pages preceding what she was shown.

That Ms. Silva's false testimony, with reasonable likelihood, could have affected the judgment of the jury is an understatement. All that need be found is that the evidence withheld was favorable to the defense. United States v. Kahn, supra, 472 F.2d at 287. To say, as the Government does, that Kavaler could not begin to show that there was any reasonable likelihood that this testimony could have affected the judgment of the jury [Gov't. Br. at 37] is to disregard the record upon which the prosecution sought and obtained the defendant's conviction.

CONCLUSION

The judgment of conviction should be reversed with instructions to dismiss the indictment, or, in the alternative, a new trial should be granted.

Respectfully submitted,

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